6

MARY P. LOXLEY'S ESTATE.

CHARLES YARD'S APPEAL.

SUPREME COURT.

January Term, 1877. No. 76.

LONGSTRETH,
HAGERT,
Attorneys for Appellant.

INDEX.

	PAGE
History of case	1
Auditor's report	1
Exceptions of McCurdy's	43
Exceptions of Charles Yard	44
Opinion of Orphans' Court	45
Decree	45
Assignments of error	45
Argument	46
Supplemental argument	49

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In the Orphans' Court for the County of Philadelphia.

Estate of Mary P. Loxley, deceased.

The account of Charles Yard, Executor, was referred to John M. Collins, Esq., as Auditor, before whom Charles Yard claimed the whole of the legacy given by the will of Mary P. Loxley, deceased, in the following words:—

And, whereas, I have given unto my friends, John Yard, Jr., and Charles Yard, certain bequests, now in addition to the same and in consideration of the long and faithful services by them both as agents and friends and from the care and attention bestowed on my estate, increasing the same, and their attention to my bodily comfort, I desire to give them a more substantial compensation and evidence of my regard for them and their services. I do, therefore, give, devise, and bequeath unto said John Yard, Jr., and Charles Yard, all the City of Philadelphia loans of every description now standing in my name, amounting in all to the sum of one hundred and sixteen thousand three hundred dollars, or the equivalent of the same in money, should I dispose of the same, or any part thereof, during my lifetime; this bequest to be free and clear of collateral inheritance tax, and in addition to what I have in my said will devised to them and to be received by them, in addition to their usual compensation or commissions as executors for settling my estate.

John Yard predeceased the testatrix by a few days. The Auditor allowed Charles Yard the one-half of said legacy, and awarded the other half to the residuary legatees. The personal representatives of John Yard, Jr., also appeared

before the Auditor and claimed the half of said legacy. Exceptions were filed on the part of Charles Yard and the claimants under John Yard, Jr.'s will to the Auditor's Report, pages 43 and 44, but the same were dismissed by the Court and the report confirmed, page 45.

MARY P. LOXLEY'S ESTATE.

AUDITOR'S REPORT.

To the Honorable, the Judges of the Orphans' Court for the City and County of Philadelphia.

The auditor appointed to audit, settle, and adjust the account of Charles Yard, executor of the last will and testament of Mary P. Loxley, deceased, and to report distribution of the balance in his hands, respectfully reports:—

That having given due notice, according to the rules of Court, of the time and place of meeting by advertisement in the "Legal Intelligencer," and in the "Evening Bulletin," a newspaper published daily in this city, he was attended at the time and place therein named, or at adjourned meetings, as stated in partial reports filed, respectively, on the 17th of April, 1874, and the 3d of April, 1875, by Henry S. Hagert, Charles T. Bonsall, and Joseph B. Townsend, Esquires, of counsel for the Accountant, Charles Yard;

John P. Montgomery, Esquire, of counsel for Richard C. W. Radford and Octavia Duval Radford his wife, the said Octavia being a legatee under said will, and Mr. Radford being the guardian, in Virginia, of Susan T. Duval, Catharine L. Duval, and Gabriel B. J. Duval, minors, also legatees under said will;

R. L. Ashhurst, Esquire, of counsel for the Philadelphia Trust, Safe Deposit, and Insurance Company, guardian of Joseph R. Massey, a minor, and legatee under said will (afterwards Mr. Ashhurst withdrew his appearance on behalf of said Joseph R. Massey, and Joseph B. Townsend, Esquire, appeared for him, he having attained full age);

E. Spencer Miller, Esquire, M. J. Mitcheson, Esq., and Uselma C. Smith, Esq., for Mrs. Charlotte Goodrich, a legatee

under said will; but Messrs. Smith and Mitcheson afterwards withdrew their appearance for Mrs. Goodrich;

E. Spencer Miller and M. J. Mitcheson, Esqrs., for Uselma C. Smith, Esq., guardian in Pennsylvania of the estates of said Susan T. Duval, Catharine L. Duval, and Gabriel B. J. Duval, minors;

John P. Montgomery, Esq., counsel for Horatio G. Jones, Esq., appointed guardian of the estates in Pennsylvania, of said Susan T. Duval, Catharine L. Duval, and Gabriel B. J. Duval, in place of said Uselma C. Smith, Esq., who retired from the said guardianship, the said minors having arrived at the age of fourteen years, and chosen said H. G. Jones, Esq., as their guardian;

M. J. Mitcheson and Uselma C. Smith, Esq., of counsel for Benjamin Ogden Loxley, a legatee under the 3d codicil to said last will; James M. Taylor and Elizabeth J. Taylor his wife, the said Elizabeth being a legatee under said 3d codicil, and Robert Lowry and Anna R. Lowry his wife, the said Anna being a legatee under said 3d codicil;

Joseph B. Townsend, Esq., of counsel for Mrs. Letitia L. Cresson (wife of John C. Cresson, since deceased), legatee under said will; and for Joseph R. Massey a legatee above named;

George W. Biddle, Esq., of counsel for Anna E. Massey, Rebecca Massey, Amy Ann Massey, Elizabeth M. Yarnall, wife of Wm. Yarnall, Lambert R. Massey, and Alexander L. Massey, legatee under said will: also for the accountant;

John H. Campbell, Esq., counsel for Margaret Bransby and Eunice Childs, devisees under the second codicil to said will;

John A. Clark, Esq., counsel for Charles P. Massey, a legatee under said will;

Hon. F. C. Brewster for Charles Yard, surviving executer of the last will of John Yard, Jr., deceased; for Robert McCurdy, Hannah T. McCurdy, and Ann Eliza McCurdy, children and heirs at law of Hannah R. McCurdy, deceased, a daughter of said John Yard, Jr., deceased, who was a

legatee and devisee under said will of Mary P. Loxley; and for Mrs. Ann Eliza Heintzelman, wife of Rush B. Heintzelman, and a daughter of said John Yard, Jr., deceased;

John G. Johnson and E. L. Perkins, Esqs., of counsel for Nicholas Murray, executor of the will of Eliza J. Murray, deceased, and for Nicholas Murray, Rosa Murray, Mary J. Butler (formerly Murray), wife of Henry L. Butler, and Thomas Chalmers Murray, children of said Eliza J. Murray, contestants in the Register's Court (as hereinafter mentioned) of the validity of the will of said Mary P. Loxley and the codicils thereto;

and by

the said H. G. Jones, Esq., and the said Charles Yard in person.

Since the first report the following changes have taken place: John P. Montgomery, Esq., having departed this life, Hon. Horatio Gates Jones appeared for Mrs. Radford, and Susan T. Duval having attained her majority, Mr. Jones appeared also as her counsel.

Charles T. Bonsall, Esq., withdrew his appearance as counsel for the accountant, and J. Cooke Longstreth, Esq., was retained, and appeared as counsel for said accountant with Mr. Hagert.

In February last Louis C. Massey, Esq., appeared as counsel with Mr. Biddle for the parties then represented by him.

Rebecca Massey departed this life, and Messrs. Massey and Biddle appeared for her estate.

The said Mary P. Loxley died in this city on the 7th day of April, 1870, having first made her last will and testament in writing, dated the 6th day of February, 1860, and three codicils thereto, the first dated September 22d, 1864, the second dated July 6th, 1865, and the third dated August 6th, 1866, of which last will and codicils the following is a true copy, to wit:—

Be it remembered, That I, Mary P. Loxley, of the city of Phildelphia, in the State of Pennsylvania, single woman, being of sound, disposing mind, memory, and understand-

ing, do hereby make and ordain my last will and testament in manner following, that is to say:—

Imprimis. I will and direct that all my just debts and funeral expenses to be fully paid and satisfied as soon as conveniently can be after my decease.

Item. I give and bequeath unto my friend Amy Ann Massey, daughter of my cousin Charles Massey, all my household goods, wearing apparel, furniture, jewelry, and plate of every kind and description, for her own use absolutely forever.

Item. I give, devise, and bequeath unto my friend, the said Amy Ann Massey, her heirs and assigns, all that certain lot or piece of ground, with the buildings and improvements thereon erected, purchased by me from David B. Paul, situate on the northerly side of Bridge Street, in that part of the said city of Philadelphia formerly called the village of Mantua, marked in the general plan of the said village number fifty-five, containing in front or breadth on the said Bridge Street fifty feet, and in length or depth northward one hundred and sixty feet to Garden Street, with the appurtenances; also the policy of insurance effected thereon.

Item. I give, devise, and bequeath unto my cousin, Mary Jackson, widow (daughter of my aunt, Ann Reese), her heirs and assigns, all that certain lot or piece of ground, with the buildings and improvements thereon erected, situate on the west side of Park Street, at the distance of one hundred and forty feet northward from the north side of Chestnut Street, in that part of the said city of Philadelphia formerly called the district of West Philadelphia, containing in front or breadth on the said Park Street thirty five feet, more or less, and extending of that width in length or depth westward one hundred feet, with the appurtenances; also, the policy of insurance effected thereon.

Item. I give, devise, and bequeath unto my friend, Mary Loxley (wife of my cousin Reverend Benjamin Loxley), her heirs and assigns, all that certain lot or piece of ground, with the buildings and improvements thereon erected, situate

at the northwest corner of William and Oak Streets, in that part of the said city of Philadelphia formerly called the district of West Philadelphia, containing in front or breadth on the said William Street fifty feet, and extending in length or depth westward fifty feet, with the appurtenances; also, the policy of insurance effected thereon.

Item. I give, devise, and bequeath unto my friend Lambert Massey, son of my cousin the said Charles Massey, his heirs and assigns, all that certain lot or piece of ground, with the buildings and improvements thereon erected, situate on the south side of Bridge Street, at the distance of fifty feet eastward from the east side of Thirty-fourth Street (formerly Fifth Street), in that part of said city of Philadelphia, formerly called the village of Mantua, containing in front or breadth on the said Bridge Street fifty feet, five inches, and extending in length or depth southward about two hundred and twenty feet eight inches to Hamilton Street, with the appurtenances; also the policy of insurance effected thereon.

Item. I give, devise, and bequeath unto my friend Alexander Massey, son of my cousin, the said Charles Massey, his heirs and assigns, all that certain lot or piece of ground, with the buildings and improvements thereon erected, adjoining the last described premises to the eastward, situate on the south side of the said Bridge Street, at the distance of two hundred and eighteen feet westward from the west side of Thirty-third (formerly Fourth) Street, in that part of the said city of Philadelphia formerly called the village of Mantua, containing in front or breadth on the said Bridge Street, about thirty-six feet six inches and three-eighths of an inch, and extending in length or depth southward about two hundred and twenty feet to the north side of the said Hamilton Street, with the appurtenances; also the policy of insurance effected thereon.

Item. I give and bequeath unto my friend Charles Yard, of the said city, collector, as an evidence of my regard for him, the principal sum of a bond, warrant and mortgage, given and executed by him to me, dated the eleventh day of

June, Anno Domini 1855, recorded in Mortgage Book R. D. W., No. 16, page 6, etc., to secure the payment of the sum of three thousand six hundred dollars, with interest, on property situated at the northeast corner of Jacoby Street and Winslow Street (formerly called Wager Street), in the said city of Philadelphia, and all interest accrued on said mortgage to the time of my decease; and I hereby direct my executors hereinafter named, on my decease, to enter satisfaction of record on said mortgage, to assign and transfer the said bond, warrant, and mortgage to him, the said Charles Yard, his heirs, executors, or administrators.

Item. I give, devise, and bequeath unto my friend, the said Charles Yard, his heirs and assigns, all that certain lot or piece of ground, with the buildings and improvements thereon erected, situate on the west side of Till Street, at the distance of sixty feet northwardly from the north side of Oak Street, in that part of the said city formerly called the district of West Philadelphia, being composed of parts of the lots in the plan of the village of Hamilton, number seventeen and number nineteen, containing in front or breadth on the said Till Street thirty-six feet, and in length or depth westwardly one hundred feet, with the appurtenances; also the policy of insurance effected thereon.

Item. I give, devise, and bequeath unto my friend John Yard, Junior, of the said city, collector, as an evidence of my regard for him, his heirs, and assigns, all that certain lot or piece of ground, with the three story brick messuage or tenement and other buildings thereon erected, situate at the northwest corner of Thirty-fourth (formerly Fifth Street) and Bridge Streets, in that part of the said city of Philadelphia formerly called the village of Mantua, containing in front or breadth on the said Bridge Street thirty-five feet, and in length or depth along the said Thirty-fourth Street one hundred and sixty feet to Garden Street, with the appurtenances; also the policy of insurance effected thereon.

Item. It is my will and intention that the above mentioned devises to my friends John Yard, Junior, and Charles

Yard, respectively, shall be received by them in addition to their usual commissions as executors for settling my estate.

Item. It is my will, and I direct that all the above devises and bequests shall be free and clear of all collateral or inheritance tax.

Item. It is my mind and will, and I do hereby direct, authorize, and empower my executors hereinafter named and the survivor of them, and the heirs, executors, and administrators of such survivor, in pursuance and under the express power and authority which I have hereinafter given them, to sell and convert into money all the rest, residue, and remainder of my estate, real, personal, and mixed, of which I may die seized, possessed, or entitled to, and to part and divide the net proceeds thereof (after deducting and defraying all costs, charges, and expenses attending the sale of my said estate), into three even and equal parts or shares, and one of the said three full equal third parts or shares thereof I give and bequeath unto all and every the child and children which my said cousin Charles Massey may leave surviving him, and the lawful issue of any deceased child or children who may be then living, in equal parts and shares, so, however, that the issue of any such deceased child or children shall take, if but one solely; and if more than one, then equally among them such part and share only as his, or her, or their deceased parent or parents would have taken if then living. One other of the said three full equal third parts or shares thereof, I give and bequeath unto Reverend Benjamin Loxley, son of my cousin George W. Loxley, his executors, administrators, and assigns forever; and the other and remaining of the said three full equal third parts or shares thereof, I give and bequeath unto all and every the lawful child and children which my Aunt Elizabeth Jones may leave surviving her, and the lawful issue of any deceased child or children who may be then living, in equal parts and shares, so, however, that the issue of any such deceased child or children shall take, if but one solely; and if more than one, then equally among them such part and share only as

his, her, or their deceased parent or parents would have taken if then living.

Item. For the purpose of executing the objects and intentions of this my said will in accordance with my wish above expressed, I do hereby authorize, direct, and empower my said executors hereinafter named, and the survivor of them, and the heirs, executors, and administrators of such survivor, at any time or times after my decease that they may deem proper, to sell and dispose of either at public or private sale or sales, all, or any part or portion of my said residuary estate, for the best price or prices that can be reasonably had and obtained therefor, and upon any such sale or sales thereof, on the receipt of the purchase money, or a sufficient security therefor, by proper deed or deeds, conveyances, or other assurances in the law, to grant, bargain, sell, assign, and convey the same to the purchaser or purchasers thereof, his, her, or their heirs, executors, administrators, and assigns forever, without any liability whatever on the part of any purchaser or purchasers thereof, to see to the application of the purchase money, or being liable for the non-application or misapplication thereof.

Item. I hereby nominate and appoint my friends, the said John Yard, Junior, and Charles Yard, executors of this my last will and testament, hereby revoking all wills and testaments by me at any time made heretofore, and declaring these presents only to be and contain my last will and testament.

In witness whereof, I, the said Mary P. Loxley, have hereunto set my hand and seal, this sixth day of February, in the year of our Lord one thousand eight hundred and sixty.

MARY P. LOXLEY [SEAL].

Codicil.—I, Mary P. Loxley, do make and publish this codicil to be added to, and taken as part of my last will and testament, bearing date the sixth of February, A. D. 1860, as follows, that is to say: Whereas, I have by my

said will given and devised unto Amy Ann Massey, all that certain lot or piece of ground with the buildings and improvements thereon, situate on the northerly side of Bridge Street, containing in front fifty feet, and in depth one hundred and sixty feet, which property I purchased from David B. Paul, and also the policy of insurance effected thereon, and also the household goods, wearing apparel, furniture, jewelry, and plate of every kind and description, which I gave to the said Amy Ann Massey in my last will.

Now I do hereby revoke and make void the said gift and devise to Amy Ann Massey, and in all other respects do confirm and ratify the said last will and testament, and every clause, bequest, and devise therein contained.

In witness whereof, I have to this codicil set my hand and seal the twenty-second day of September, in the year of our Lord one thousand eight hundred and sixty-four, to the end that the same may be annexed to and made and be a part of my said last will and testament.

MARY P. LOXLEY [SEAL].

I, Mary P. Loxley, the within-named testatrix, do make and publish this second codicil, to be added to and taken as a part of my last will and testament, bearing date the sixth day of February, A. D. 1860, and the first codicil thereto, bearing date the twenty second day of September, A. D. 1864, in manner following, to wit:—

First. Whereas, in my said last will and testament, I gave, devised, and bequeathed unto my friend Mary Loxley, wife of my cousin, Rev'd Benjamin Loxley, her heirs and assigns, all that certain lot or piece of ground with the buildings and improvements thereon erected, situate at the northwest corner of William and Oak Streets, in that part of the city of Philadelphia formerly called the district of West Philadelphia, in front on said William Street fifty feet, and in depth westward fifty feet, fully described in the fourth item of my said last will and testament, with the

policy of insurance effected thereon; now I do hereby revoke and make void the said devise and bequest to the said Mary Loxley her heirs and assigns, and in place thereof, it is my will, and I do hereby give, devise, and bequeath the said lot of ground with the buildings and improvements thereon, and all other the appurtenances, free and clear of all collateral inheritance tax, unto my friend Margaret Bransby, wife of William Bransby, her heirs and assigns forever.

Second. I give, devise, and bequeath unto my friend Eunice Childs, wife of John Childs, her heirs and assigns, all that, my lot of ground and buildings thereon, situate on the south side of Warren Street, west of Thirty-fifth Street, in the city of Philadelphia, now occupied by her, and which I purchased from Joel Lane; also the policy of insurance effected thereon—this devise and bequest to be clear of collateral inheritance tax—and in all other respects I do confirm and ratify my said last will and testament, and every clause, bequest, and devise therein contained, excepting, however, such devise as I have revoked and annulled by the first cocicil to (this) my last will and testament.

In witness whereof, I, the said Mary P. Loxley, have hereunto set my hand and seal, this sixth day of July, in the year of our Lord one thousand eight hundred and sixty-five (1865).

MARY P. LOXLEY [SEAL].

I, Mary P. Loxley, the within-named testatrix, do make and publish this my third codicil, to be added to and taken as part of my last will and testament, bearing date the sixth day of February, A. D. 1860; the first codicil thereto bearing date the twenty-second day of September, A. D. 1864, and the second codicil thereto bearing date the sixth day of July, A. D. 1865, in manner following:—

Whereas, in the devise of the residue of my real, personal, and mixed estate, I have directed my said estate to

be sold and divided, and one-third part thereof to be given unto Reverend Benjamin Loxley, son of my cousin George W. Loxley, his executors, administrators, and assigns forever; and said Benjamin Loxley has since deceased, leaving children, by which decease the children of said Benjamin Loxley would not receive any portion of my estate: Now my wish is, and I hereby give and bequeath the third part of my estate, that would have gone to said Benjamin (Loxley) had he survived me, unto all and every the lawful child or children of said Benjamin Loxley, who may be living at the time of my decease, and the lawful issue of any deceased child or children who may be then living, in equal parts and shares, so, however, that the issue of any such deceased child or children shall take, if but one, solely; and if more than one, equally among them, such part and share only as his, her, or their deceased parent or parents would have taken if then living.

And, whereas, I have given unto my friends, John Yard, Jr., and Charles Yard, certain bequests, now in addition to the same and in consideration of the long and faithful services by them both as agents and friends, and from the care and attention bestowed on my estate, increasing the same, and their attention to my bodily comfort, I desire to give them a more substantial compensation and evidence of my regard for them and their services. I do, therefore, give, devise, and bequeath unto said John Yard, Jr., and Charles Yard, all the city of Philadelphia loans of every description now standing in my name, amounting in all to the sum of one hundred and sixteen thousand three hundred dollars, or the equivalent of the same in money, should I dispose of the same, or any part thereof, during my lifetime; this bequest to be free and clear of collateral inheritance tax, and in addition to what I have in my said will devised to them and to be received by them, in addition to their usual compensation or commissions as executors for settling my estate.

In witness whereof, I have hereunto set my hand and seal

this sixth day of August, A. D. one thousand eight hundred and sixty-six. In all other respects thereby ratifying and confirming my said will and the codicils thereto, excepting where I may have revoked any part of my said will by codicils, and to the end and intent that this may be annexed to and made a part of my said last will and testament.

MARY P. LOXLEY [SEAL].

After some contest touching said papers before the Register of Wills of this county, on the 19th of May, 1870, they were admitted to probate, and on the 20th of May, 1870, letters testamentary thereon were granted to said Charles Yard, one of the persons named in said will and codicils as executor; John Yard, Jr., the other one named, having died a few days before the testatrix, viz., on the 25th of March, 1870.

Shortly after appeals were taken from the decision of the Register, admitting said will and codicils to probate to the Register's Court of this county, and by said court issues were granted at the instance of N. Murray, above named, and others, to try the validity of said writings.

On the 7th day of July, 1871, the executor, Charles Yard, filed his first account, which on the 17th of November of the same year, was referred to the undersigned as auditor. Said account and certain other subject matters of litigation before the auditor are, in pursuance of the agreement hereinbelow last recited, passed upon in another report filed herewith, to which the auditor craves leave to refer.

In May, 1873, after the trial of the issues above referred to had proceeded before a jury in the Common Pleas Court for many days, parties in interest signed the agreement, of which the following is a copy, viz: —

"The jury to find in favor of the plaintiff on all the issues.

The auditor to allow the accountant and estate of John

Yard, Jr., dec'd, for the whole interest on the city sixes up to the death of testatrix, without prejudice to the question of the lapse of John Yard's half of the loan.

The question of the effect of John Yard's death on the bequest of his half of the city loan with interest accruing thereon since death of testatrix to be open to the decision of the auditor and court, in the matter of the settlement of the accounts, and said half and all interest thereon after the death to follow such decision.

The sum of ($7500.00) seven thousand five hundred to be paid to E. Spencer Miller for Mrs. Goodrich by Charles Yard within a month after verdict.

Each party to this agreement to pay his own costs—all other costs to be paid out of estate.

The Benjamin Loxley branch to conform to this agreement, and Mr. Mitcheson to sign as evidence of this.

No party to this agreement will interpose any objection to a distribution being now made under the pending audit of all the estate except only enough to cover the one-half of the city loan bequeathed to Jno. Yard, and interest from death of testatrix, and a reasonable sum to cover costs of litigating the questions arising thereon.

(Signed) USELMA C. SMITH,
E. SPENCER MILLER,
H. S. HAGERT,
C. T. BONSALL,
for C. Yard.
JNO. P. MONTGOMERY,
for Mrs. O. Radford, etc.
H. G. JONES,
Guardian, etc.
J. B. TOWNSEND,
for Chas. Yard, S'rv'ng Ex'r.
M. J. MITCHESON,
CHARLES YARD."

A verdict was rendered in said Common Pleas Court in favor of the validity of the said will and codicils.

Messrs. Biddle and Townsend, having represented the accountant before the auditor touching matters involving questions of the mental capacity of testatrix, undue influence, etc., after said verdict withdrew their appearance for him, and continued to represent only the legatees on whose behalf as above stated they had appeared.

On the 17th of April, 1874, the auditor, at the request of parties, filed a report of a distribution of $300,000.00—a portion of the residue—and the same was afterwards absolutely confirmed.

It appeared by said report that at various dates after the 30th of June, 1873, the accountant had transferred and paid to the said several residuary legatees securities and cash, and that some of the parties had been over-advanced, and the auditor on the 3d of April, 1875, filed another report distributing the further sum of $66,254.77, part of the residue, and adjusting all the shares of the residuary legatees by proper charges and by computing interest on the amounts theretofore paid to April 17th, 1875.

The account filed not having included the capital of the estate, and the administration having proceeded for several years after the filing, the accountant, Mr. Yard, on the 11th of May, 1875, filed with the auditor a statement prepared by W. W. Warr, Public Accountant, of the condition of the estate and of the receipts and expenditures down to about the time of the confirmation of said last report.

There being much controversy concerning the items of the account, the character of the investments made by the executor, and other matters, the legatees entered into an agreement, of which the following is a copy, viz.:—

Memorandum of agreement made this twenty-first day of January, 1876, by and between the devisees and legatees under the will of Mary P. Loxley, deceased, acting in person or by their counsel respectively of the one part, and Charles

Yard of the other part, in order to remove difficulties and controversies in the way of a speedy and final settlement of her estate.

First. The account, as stated by Mr. Warr, shall be treated as duly vouched and correct in every particular, and shall be so found and reported by the auditor with the following exceptions, viz.:—

1st. Charles Yard, the executor, shall be charged with and be accountable for the sums collected and received by Charles T. Bonsall and Bonsall Bros., amounting in the aggregate to $\$23{,}779\frac{09}{100}$, for which he is credited in said account; but he shall not be charged with interest on said sum or on any balances which have been in his hands not drawing interest.

2d. The commissions charged by the executor shall, as to the rates and amounts of the same as respects different portions of the estate, be submitted to and decided upon by the auditor, who shall award lawful commissions, as to a faithful executor, and whose report thereon shall be confirmed without exceptions.

3d. Clear mistakes in calculation or the omissions of admitted debits or credits, discovered and pointed out before the first of February proximo, may be corrected by the auditor.

4th. No interest shall be charged on sums credited to the estate in place of the following securities, originally bought as investments but objected to by the parties, and withdrawn and taken to himself by Mr. Yard, or left out of the Warr account, to wit, the

Leslie mortgages amounting to . .	$8000	00
Charles T. Bonsall " . .	7000	00
Gordon McNeil . .	2000	00
and Shoemaker (Charles) " . .	5000	00

Second. The executor shall, on or before the said first proximo, file with the auditor a supplemental account

brought up to the present date, including all items not appearing in the former account, which account shall be treated as regularly before the auditor and shall be audited and adjusted by him, as if duly filed, advertised, and referred to him.

Third. The question as to the right of Charles Yard, or others, to receive the one-half part of John Yard, in and of the legacy of $116,300, in the loan of the city of Philadelphia bequeathed by said testatrix to John Yard, Jr., and Charles Yard is to be left to the auditor, with the usual right of any party to except to the report on said subject, and pursue his exceptions in the usual way by appeal or otherwise.

Fourth. When the auditor has reached his conclusions, upon all the questions presented for his decision, he shall set apart sufficient securities including the Bonsall mortgages of $10,000 and $6000 respectively, and the Scheuing mortgages of $20,000 and $10,000 respectively, at par, with interest to cover the sum which may be due to those who shall be finally adjudicated to be entitled to the said John Yard, Jr.'s interest, being the remaining one-half part of the legacy of $116,300 city 6's mentioned in and by the will of the said testatrix, to be bequeathed to the said John Yard, Jr. and Charles Yard, said John Yard, Jr. having died before the testatrix. These securities shall be deposited with or be subject as respects interest as well as principal and the reinvestment thereof to the order of the undersigned J. Cooke Longstreth, Joseph B. Townsend, MacGregor J. Mitcheson, Uselma C. Smith, and Louis C. Massey, until they shall be needed for final distribution, except that the said Bonsall and Scheuing mortgages, so reserved, for which said executor makes himself personally liable, and the full amounts of which, principal and interest, according to the faces of the same respectively, he hereby guarantees to the estate, may be left in the hands of Henry S. Hagert and J.

Cooke Longstreth, Esqs., for collection, at the risk and expense of said executor. All moneys received by the executor for account of the estate, principal and interest, shall be deposited in the "Fidelity Insurance, Safe Deposit, and Trust Company," not to be withdrawn except by leave of the Orphans' Court, under the existing order, which shall be held as continuing until the adjudication by the Court, and final distribution. To secure to that extent his guaranty of said Bonsall and Scheuing mortgages with interest as aforesaid, said Charles Yard shall forthwith execute and record, and deposit with said J. Cooke Longstreth, a bond and mortgage on his house, No. 1706 Vine Street, for $10,000, drawn payable in two years, which said Longstreth shall hold in trust for those who may become entitled to said mortgages or the proceeds thereof.

Fifth. All the rest of the estate shall, immediately on the confirmation of the report of the auditor, be actually divided among those to whom it is awarded. All the undersigned shall urge and insist, before the Orphans' Court, upon such a confirmation, leaving open only such questions as touch the John Yard, Jr.'s said legacy and the payment of the United States succession-tax on the several properties devised in the will.

The auditor shall, in awarding distribution of said residue, settle the account of each party with the estate, and his finding in this respect shall not be subject to exceptions.

Sixth. After said report is filed, no further claim for counsel fees shall be made at any time by said executor, except for expenses necessarily incurred in collecting securities not now distributed, in which exceptions, however, the reserved Bonsall and Scheuing mortgages are not included, nor shall the executor claim any commissions other or further than those now allowed by said auditor, unless upon after-discovered property or assets of the estate, or upon interest on securities not now distributed.

In witness whereof we have hereunto set our respective hands, the day and year aforesaid.

(Signed as follows.)

CHARLES YARD.

J. COOKE LONGSTRETH,

Att'y for Charles Yard, Ex'r.

GEO. W. BIDDLE,

for the children of Charles Massey, Jr., deceased, except Charles P. Massey and Joseph R. Massey, son of J. R. Massey, deceased.

J. B. TOWNSEND,

for Mrs. Letitia L. Cresson, and for Jos. R. Massey.

E. SPENCER MILLER,

for Mrs. C. Goodrich.

USELMA C. SMITH and

MAC GREGOR J. MITCHESON,

of Counsel for the heirs of Rev. B. R. Loxley.

HORATIO GATES JONES,

Attorney for Mrs. Radford and for Miss Sue Duval, and also Guardian of Kate and Gabriel Duval.

Except as to statement of payments in distribution to Charles P. Massey, same to be corrected as per Auditor's last report.

(Signed) CHARLES P. MASSEY.

February 21, 1876.

After the verdict was entered in favor of the validity of said will and codicils, Charles Yard without objection took from the estate in his own right the one-half (being $58,150) of the city of Philadelphia loans bequeathed by the 3d codicil to him and his father, John Yard, Jr., his right to the other half being denied by the residuary legatees.

It appeared that John Yard, Jr., and Charles Yard were partners in the real estate business in this city, and, as such, had charge of the real estate of Miss Loxley from April, 1851, to July, 1866. On the 14th of July, 1866, said firm, under a letter of attorney, took the entire charge of her

property, both real and personal. The interest that accrued on her city of Philadelphia loans after July 1st, 1866, was given by her to said John Yard, Jr., and Charles Yard. The firm collected the interest for her, but in each receipt taken by them from her for the same, she does not express the gift to be to them as a firm; she, after acknowledging the receipt of the money, stating that she has "handed it over to John and Charles Yard as a gift," etc., and as "an evidence of" her "good will for their faithful attention and services to" her. She owned at the time of her decease Philadelphia city loans to the amount of one hundred and sixteen thousand three hundred dollars ($116,300).

In whom at the death of testatrix, the title to the said one-half of the city loans vested, and (they having been sold and not yet replaced) who is entitled to their equivalent in money with interest, must now be determined.

Messrs. Hagert and Bonsall, for Charles Yard, claimed that he was entitled to the whole $116,300 of city loan specifically bequeathed to John Yard, Jr., and Charles Yard; that there was no lapse as to any part of it by the death of John Yard, Jr., in the lifetime of testatrix, but that the whole survived to Charles Yard either as a joint tenant or as the surviving member of a class; that the decision in Kennedy's Appeal, 10 P. F. Smith's R. p. 511, interpreting the Act of Assembly of the 31st of March, 1812, concerning joint-tenants, referred only to a joint tenancy in real estate; that it has not been held applicable to joint interests in personal property; that the phraseology of the Act, "If partition be not made," etc., shows it is to be confined to such species of property as might be the subject of proceedings in partition; that if the gift of the city loan was not to John Yard, Jr., and Charles Yard as joint-tenants, it was to them as a class either of agents or executors; that the result of such a bequest is not that the interest of a deceased legatee passes to his kindred or executors, but that the whole belongs to the survivor, because the survivor is the only person who represents the class at the time of testatrix's death; that it was

not necessary that the gift should be to John Yard, Jr., and Charles Yard *quâ* executors or agents, if it is clear from the context that it was intended for them as executors or agents and not as individuals; that from the language of testatrix, "I desire to give them a more substantial compensation, and evidence of my regard for them and their services," and "in addition to their usual compensation or commissions as executors for settling my estate," it is clearly intended that John Yard, Jr., and Charles Yard should receive the legacy in the same capacity and manner in which they were to receive commissions; and that as Charles Yard is entitled to the whole of the commissions as executor, notwithstanding his father's death, so he is entitled to the whole legacy in question.

Mr. Longstreth, for Mr. Yard, did not consider the question so much one of joint tenancy or lapse as of the plain intention of testatrix, which he contended was to give the whole $116,300 of loan as a unit to either of the two legatees if the other should be dead when the will took effect; that the fact that the two men were a firm is a circumstance to be taken into account in construing the codicil; that they were known to her as partners, and a large part of the consideration for the bequest was their services as a firm; that there are no words of limitation or distribution, and that the testatrix intended to give the city loan away from the residuary legatees, and to give it to John Yard, Jr. and Chas. Yard in bulk as a whole, as much as if she had given them a horse or other indivisible chattel, and the death of either, therefore, ought not to diminish the specific legacy.

Judge Brewster, for Charles Yard, surviving executor of the last will of John Yard, Jr., deceased, and for the next of kin of said John Yard, Jr., claimed the one-half of said legacy of $116,300, contending that the bequest was to John Yard, Jr., and Charles Yard as a class of agents, or executors, or both; that they were entitled to moieties; that by the death of John Yard, Jr., in the lifetime of testatrix the whole did not survive to Charles Yard, nor did the one-half share of the deceased legatee lapse into the residue, but said share

passed to the executor of said legatee for his next of kin; that this was the intention of testatrix not only, but is expressly directed by the Act of 31st of March, 1812; and that this view is sustained by the language of the decision in Kennedy's Appeal, 10 P. F. Smith's Rep.

Messrs. Montgomery, Biddle, Miller, Townsend, Jones, Mitcheson, Clark, Smith, and Massey, of counsel for the residuary legatees, contended, on the other hand, that if the bequest was to John Yard, Jr., and Charles Yard, as joint tenants, the Act of 31st March, 1812, made it obligatory to treat them as tenants in common; that the question is settled as to real estate by the decision in Kennedy's Appeal, 10 P. F. Smith; that said Act, made to prevent survivorship which was odious, applies as well to personal property as real estate, and, in this instance, takes away any right of Charles Yard as survivor, and leaves the case as if there had been two legacies, each of $58,150 of Philadelphia city loan; that, independently of the Act of 1812, this is a gift to tenants in common partly for services rendered each on his own account, and one having predeceased the testatrix, his share lapsed, and that said lapsed share does not go to his next of kin, but passes to the residuary legatees, and cited Kennedy's Appeal, 10 P. F. Smith, p. 511; Martin *v.* Smith, 5 Bin. 16; Duncan *v.* Forrer, 6 Bin. 193; Neff's Appeal, 2 P. F. Smith, 326; Bambaugh *v.* Bambaugh, 11 S. & R. 191; Patterson *v.* Swallow, 8 Wright, 487; Seely *v.* Seely, ibid. 436; Fissel's Appeal, 3 Cas. 55; Miller's Appeal, 11 Cas. 323; and Risk's Appeal, 2 P. F. Smith, 273; also Act of 31st of March, 1812, Purdon's Dig., ed. 1873, p. 815.

The auditor submits as follows:—

It was proved by the claimant, Charles Yard, that John Yard, Jr., and Charles Yard were partners in the real estate business, and one of the alternative positions of the claimant was that the bequest might be to them, a firm.

It is true that the testatrix's statement that her gift was partly "in consideration of the long and faithful services by

them both as agents and friends, and from the care and attention bestowed on my estate, increasing the same," might, if standing alone, be taken to refer to John Yard, Jr., and Charles Yard as partners. But, if so, neither Charles Yard nor the estate of John Yard, Jr., would be entitled to anything. For, as remarked by a modern writer (Parsons on Partnership, p. 2), a partnership is neither a joint tenancy nor a tenancy in common. They all have the element of joint ownership, but in all other respects are different. Only when the partnership is terminated are the partners tenants in common, and the unities essential to joint tenancy of title, interest, time, and possession, may be absent from a partnership, and the characteristic incident of survivorship is wholly wanting in fact, it existing only as a trust for the purposes of settlement. John Yard, Jr., was one person, Charles Yard another, and the firm of "John Yard, Jr., and Son" an entirely distinct party from either of them, as well "*inter sese*" as to strangers. So that, if the firm was the object of the gift, it having been dissolved by the death of John Yard, Jr., the legatee had no existence when the will took effect, and the whole legacy lapsed. For the rule is that if the devisee dies before the devisor, the devise becomes void; a doctrine supposed to be derived from the rule of the civil law, "pro non scriptis sunt iis relicta qui, vivo testatore, decedunt;" the old principle of law being that in all gifts, whether by devise or otherwise, there ought to be a person in esse capable of taking at the time the gift vests, and as the thing devised cannot vest till the death of the devisor, if the devisee was then dead it followed he could take nothing by the devise (6 Cruise, 129). So by analogy as to personal property. In Comfort *v.* Mather (2 Watts & Ser. p. 450), it was decided that a legacy lapsed where the legatee, not being within the provisions of the Acts of Assembly preventing a lapse, died in testator's lifetime, notwithstanding the testator knew of his death, and intended his children should have the benefit of the legacy. And there is no reason why a lapse should not be declared

when a copartnership is the legatee, and it is dissolved by the death of one of its members in the lifetime of the testator.

It is submitted, however, that in this instance the true construction of the third codicil to Miss Loxley's will is, that the bequest is to John Yard, Jr., and Charles Yard not as partners, but either as joint tenants or tenants in common. These must be considered in order, first, as to joint tenancy.

It has long been held that things personal may belong to their owners, not only in severalty, but also in joint tenancy, and in common, as well as real estate (2 Bl. 399).

When legacies are given to two or more persons in undivided shares, as a certain sum to "A. and B.;" or in case of a bequest to two without words of severance, the legatees will take as joint tenants; and if one dies before the joint-ure be severed, the other will take the whole by survivorship just as in the case of lands and tenements. This accruing from one legatee to another after the gift has vested is intelligible; not so, when nothing is vested. And yet, although (as said in Hawes *v.* Hawes, 1 Wils. R. 165), "strictly speaking, survivorship respects a time *after* the testator's death, the *jus accrescendi* pre-supposing an *actual vesting* of the interest in the parties," if a bequest be made to two as joint tenants, and *one of them die in the lifetime of the testator*, the same rule is applied as in vested estates, and the share of the one dying will not lapse but will survive to the other.

In Morley *v.* Bird, 3 Ves., Jr. *628, it was held that notwithstanding the leaning of Courts of Equity to a tenancy in common, an interest given to two or more by way of legacy or otherwise is joint, unless there are words of severance, as "equally," "among," etc., or an inference of that sort arises from the nature of the transaction, as in partnerships, a joint mortgage, etc. In that case, William Collins gave to his daughter his estate on condition that she would pay to the four daughters of her brother John Collins £400,

out of seven in the 3 per cent. Consolidated. Three of the four daughters died in the life of the testator, and it was adjudged that the whole interest survived to the survivor.

In Buffar *v.* Bradford, 2 Ath. 220, a testator, having divided his personal estate into eight shares, gave four parts to his niece Buffar, and the children born of her body. The plaintiff was born after the will was made, and Mrs. Buffar died in the testator's lifetime; and it was held that this was not a lapsed legacy, for she did not take an estate tail, but as a joint tenant with the plaintiff, and, as she was dead, he took the whole by survivorship.

To the same effect is Whitmore *v.* Trelawny, 6 Ves., Jr. *129. Similar decisions are found in Webster *v.* Webster, 2 P. Wms. 347; Gray *v.* Willis, ibid. 529; and Campbell *v.* Campbell, 4 Bro. Ch. R. 15.

In Hogan *v.* Hogan, 3 Dana, 572, there was a bequest to three sons of a residue of "goods and chattels." C., one of the three, died in the lifetime of testator, and it was held that the bequest, being joint, survived to the two remaining sons.

Assuming that the words of the codicil now under consideration create a joint tenancy, does the Act of the 31st of March, 1812, destroy the right of survivorship? It provides as follows, viz.:—

"If partition be not made between joint tenants, whether they be such as might have been compelled to make partition or not, or whatever kind the estate or thing holden or possessed be, the parts of those who die first shall not accrue to the survivors, but shall descend or pass by devise, and shall be subject to debts, charges, curtesy, or dower, or transmissible to executors or administrators, and be considered to every other intent and purpose, in the same manner as if such deceased joint tenants had been tenants in common. Provided always, That nothing in this act shall be taken to affect any trust estate."

It is said (note to 4 Kent, *362) that probably the earliest legislative interference on record with the doctrine of the *jus accrescendi* is found in the enactment by the General

Court of the Plymouth Colony, in 1643, that survivorship should not apply to joint tenants, but the heirs of the joint tenant dying should take his proportion of the estate.

In the United States now it may be said to have become a general rule, by force of statutory enactments, that all estates vested in two or more persons are to be deemed tenancies in common unless a different tenure is clearly expressed or implied in the instruments creating the estates. So it is in Maine, New Hampshire, Massachusetts, Vermont, New York, New Jersey, Rhode Island, Delaware, Indiana, Missouri, Illinois, Michigan, and Arkansas. In some of these States estates vested in trustees and executors are excepted. In other States only the *jus accrescendi* is expressly abolished, without any excepted case, in Georgia, Virginia, Kentucky, Mississippi, Alabama, and Florida; and, in this State, with the exception of estates vested in trustees. In Connecticut the right of survivorship has been denied by the courts, and in Ohio, it is said, estates in joint tenancy have never been recognized.

The Act of Assembly of this State must be read in the light of the decisions thus far made interpreting its meaning, which hold, substantially, that its phraseology, where it is of dubious significance, ought to receive a construction favorable to tenancy in common.

In most of the statutes of other States converting joint tenancies into tenancies in common, it is expressly declared that the law shall apply as well to existing joint tenancies as to those afterwards to be created. But in Bambaugh *v.* Bambaugh, 11 S. & R. 192, it was held that our act has this effect *proprio vigore*, and without any such express words; the law being beneficial, and designed to get rid of the inconveniences of joint tenancies.

In Duncan *v.* Forrer, 6 Bin. 193, where it was decided that a last will did not sever a joint tenancy, Judge Yeates said that by the Act of the 31st of March, 1812, concerning joint tenancy, "joint tenancies in all cases except trusts are transmuted into tenancies in common."

In Bambaugh *v.* Bambaugh, 11 S. & R. 192, the Court, in deciding that said Act of 1812 extended to estates in joint tenancy which were in existence at the time it was passed, said, "the words of the law are explicit, and comprehend all joint tenants," etc. "The truth is that the doctrine of survivorship was so little known to people in general, and so abhorrent to their feelings when known, that it was thought best to get rid of it at once. The courts had been long struggling against it, but were unable, without a dangerous prostration of established principles, to go as far as they wished. The aid of the legislature was therefore necessary."

In Seely *v.* Seely, 8 Wright, 437, it was decided that a devise to two to hold during their natural lives, and after their decease to their heirs, did not make the devisees joint tenants with benefit of survivorship; and the Court said: "The Act of Assembly of 31st March, 1812, abolished joint tenancies in Pennsylvania, excepting only perhaps in cases expressly created by deed or will, as held in Arnold *v.* Jack, 12 Har. 57, where a distinction is taken between the creation of such an estate by express terms and its existence as an incident of title. It was there held that it might be *expressly* created, but where it resulted as an incident from the form of the grant or devise, it was taken away by the Act.

The Court in Arnold *v.* Jack, *ut sup.*, considered the operation of the Act of 1812 so strong, that it said: "Had the testator merely given the estate to his brothers as *joint tenants*, it may be that the Act of 1812 would have excluded the right of survivorship."

In Kennedy's Appeal, 10 P. F. Smith, p. 511, testatrix devised a house and lot to D. S. Kennedy, James Kennedy, and Eliza Kennedy. D. S. Kennedy (as John Yard, Jr., in this case) died after the making of the will and before the testatrix. Eliza (Hammay by marriage) died shortly after testatrix, leaving a husband and one child. James also died shortly after testatrix, leaving a widow and seven children, the plaintiffs in the suit, to whom, by will, he gave the residue of his estate, which would include whatever he might

be entitled to under the will of said testatrix. Said plaintiffs claimed the undivided half part of said house and lot, and not merely one-third, upon the ground that at the death of testatrix the whole estate in said premises passed to James and Eliza, the surviving devisees, D. S. Kennedy having died in her lifetime, and that on James's death his moiety passed to *his* devisees, survivorship having been abolished between joint tenants by the Act of 1812; that there was *no* tenancy until testatrix's death; that said Act had in view only estates actually vested; that indeed (as the Court stated their claim) "we must continue to interpret the devise to create a joint tenancy with the '*jus accrescendi*' up to the instant of the testator's death, although then, when the will takes effect, the Act *eo instanti* cuts off the survivorship and turns the estate into a tenancy in common." The Court decided that the whole estate devised did not, upon the death of D. S. Kennedy, survive to the other two devisees, and gave judgment for the plaintiffs for only the one-third thereof. It held that the Act was "remedial, and should be interpreted according to its spirit to prevent the evil it is intended to remedy;" and further said, "the rule contended for by the plaintiffs must be conceded, and under it the devise to these three persons *by name* would have been a joint tenancy. But the operation of that rule upon the estate taken by the devisees has been ruled in Beeson *v.* Miller, from Fayette County, decided at Pittsburg in 1867." "That case determined that a devise to three persons *by name*, and to their heirs, created a tenancy in common and not a joint tenancy, as a consequence of the Act of 31st March, 1812." "It is very evident that in a devise to three persons singled out by name, the testator means that each shall have his own share." And again, "we hold, therefore, where there is a devise to two or more" *nominatim*, "without a plain intent of the testator to vest the estate in the survivor, the incident of survivorship is abolished by a proper interpretation of the Act of 1812, from and after the

date of the will, and not merely from the death of the testator."

It is submitted that the decision in Kennedy's Appeal, in effect, holds that the Act of 1812 means to declare that no estate shall be considered in joint tenancy (except that in trustees) unless the intention to make it so is expressly set forth in the instrument creating the estate; that said Act establishes a rule of construction; that although in strictness there is neither a will nor devised estate until the death of testator, yet the incident of survivorship is abolished "from the date of the will" in this sense, viz., that in a case of a devise to two or more *nominatim* without an expressed intent to vest the estate, in the event of death, in the survivor or survivors, we are necessitated to read the will as if it contained words of severance; so that, in the principal case, we must add to the language of the gift to John Yard, Jr., and Charles Yard the words "as tenants in common and not as joint tenants," in order to defeat any survivorship.

By the old law, every devise of a freehold spoke from the date of the will; but a testament of personal property always spoke from the death of testator. And, assuming that devises of real estate in this commonwealth still speak from their date, except as to after-acquired lands, if the decision in Kennedy's Appeal had been put upon the ground of a devise of lands being in the nature of a conveyance from its date, so that the Act could operate, in some sort, on the devised estate between the making of the will and the death of the testatrix, there might be a question whether it would have any application in construing the Act with reference to the present gift of *personal* property. But it could not well be, as it was not, put upon that ground; for although a will is a species of conveyance, yet (as Judge Gibson said in Girard *v.* City, 4 R. 335) it is not strictly subject to the rules of conveyance at common law, the *vesting* of the estate being postponed till the death of the testator, but the will operating as regards the disposing power and capacity of testator by relation to the making of it. In other words,

devises are *construed as referring* to the state of things which prevailed at the time when the testator executed them, and bequests to that which existed at his death. Joint personalty as well as realty is the subject of the legislative enactment, as the words "whatever kind the estate or thing holden or possessed be," and "transmissible to executors or administrators." show; and there is no reason producible in favor of the principle of the decision in Kennedy's Appeal as to real estate, which does not apply with at least equal force to the case of personal property. The analogy of that decision, therefore, must be considered as controlling this case, as far as any claim to survivorship is concerned. So that, upon the hypothesis of the gift being to John Yard, Jr., and Charles Yard as joint tenants, Charles Yard is not entitled, by survivorship, to the whole of the Philadelphia city loans bequeathed.

The only other capacity in which Charles Yard can and does claim the $58,150 of city loan in question is as the surviving member of a class of legatees, tenants in common. Is this claim well founded?

The rule is that if a bequest be to two or more in common, and one of them dies in the testator's lifetime, his share will lapse, unless the bequest be made to a class, as to the children of A. in equal shares, in which case all who answer that description at the testator's decease will be entitled to divide the bequest among them (Williams, Pers. Prop. 323). And where an estate is given to children by *name*, but the whole tenor of the will shows an intention that they should take as a *class*, the share of one dying in the lifetime will go to the survivors. (Schaffer *v.* Kettell, 14 Allen (Mass.), 528.)

The bequeathing words in the present instance, "I do, therefore, give, devise, and bequeath unto said John Yard, Jr., and Charles Yard, all the city of Philadelphia loans," etc., taken singly, would make the legatees joint tenants, but the context creates a doubt, the benefit of which must, under

the decisions, be given in favor of holding the legatees to be tenants in common.

Joint tenancies are not favored in equity, because they do not tend to make proper provisions for families; and though the law favored them formerly, yet, as tenures are taken away, the law leans against them now. (Hawes *v.* Hawes, 1 Wils. R. 165.)

In a recent case, Williams *v.* Williams, Law Rep., 2 Ch. 294, the Lord Chancellor said that equity in doubtful cases inclines to infer the existence of a tenancy in common rather than of a joint tenancy.

Apart from the exceptions to the rule that a plain limitation to two or more creates a joint tenancy, such as a gift to husband and wife, or to a partnership, or as to inheritances to donees who cannot by possibility have a joint heir; the slightest indication in a will that the beneficiaries are to take in common will be enforced in equity on the ground that a tenancy in common is more equitable.

Such is now the leaning of the courts of law also. In Martin *v.* Smith, 5 Binney's R. 22, Yeates, J., said: "Joint tenancies were formerly favored at law, because they were against the division of tenures; but as tenures are many of them taken away, and in a great measure abolished, that reason ceases, and courts of law now incline against them "as much as is done in equity. They are a kind of estates that do not make provision for posterity. Chancery will decree in favor of a tenancy in common as much as it can."

In the Estate of Newhall, 6 Phil. R., p. 345, which is one of that class of cases wherein survivorship is expressly directed, but is restricted by the courts as much as possible, the Judge said: "Our law looks with disfavor on joint tenancies," p. 346; and he viewed "the case in the light of *our own legislation* upon the subject of survivorship as between joint tenants," p. 347.

Now the motives of the gift expressed by Miss Loxley in the present codicil are seemingly inconsistent with the idea of a joint tenancy in John Yard, Jr., and Charles Yard.

When she speaks of "the long and faithful services by them as agents," "and from the care and attention bestowed on my estate, increasing the same," if she does not mean their services individually, it is most probable she refers to their services as a firm, because said firm of John Yard, Jr., & Son did act as her agents, as Charles Yard claimed and proved, and no other joint service appears to have been rendered her. And the words services by them as "friends," "and their attention to my bodily comfort," plainly indicate individual services and attention. Hence, it is plausible that the bequest is to said legatees as tenants in common independently of the transmuting effect of the Act of 31st of March, 1812. But, if so, the claimant Charles Yard can take no advantage from the construction, for it is very clear that the bequest is not to his father and him *as a class.* It is not to them as a class of "agents" for the reason given above why they should be considered tenants in common, *i. e.*, that no other long joint services appear but those of the copartnership. And it is not to them as a class of "executors," because so far as the motive was their services, it was their *past* services. It is manifest that while the bequest is designed by testatrix to be "*in addition* to their usual compensation or commissions as executors," there is not a word to indicate that it is meant to be *for* their services *quâ* executors. And another and principal reason in point to show that the gift is not to them as a class of agents or of executors, is that it is made to them by their individual names.

In Workman *v.* Workman, 2 Allen (Mass.), 472, it was held that where there was a bequest to nieces, *naming* them and describing them as children of my sister, of $4000 each, the legacy to one lapsed upon her death before the testator.

In Neff's Appeal, 2 P. F. Smith, 333, a case of tenants in common under a will, the Court say "there is no survivorship, for it is not given to his sons as a class, but to them and each by *his own name,* as the term 'sons' simply identifies the individual persons meant."

See, also, Page *v.* Page, 2 P. Wms. 489, where there was

a gift of surplus of personal estate to six persons, to each a sixth part, and they were appointed executors, and one died in the lifetime of testator; and it was held that the sixth part should be taken as undisposed of, and go to testator's next of kin.

This point was more fully treated of in Barber *v.* Barber, 3 Mylne & Craig, 688. There a testator, after bequeathing property to his son and daughter, directed that if both should die under twenty-one, then the property bequeathed to them should devolve to and become the property of four persons *named* and described, to be divided between them, etc., which four persons he appointed his executors. One of the four declined to act, and the son and daughter died under twenty-one. It was held that the one-fourth share in the residue to which the executor who had renounced would have been entitled as one of the legatees over, if he had acted, was a lapsed legacy, and did not devolve to the other three persons named with him as legatees of that residue.

It was contended that the gift was to the executors as a *class.*

The Lord Chancellor said, "A gift to a class implies an intention to benefit those who constitute the class, and to exclude all others; but a gift to individuals described by their several *names* and descriptions, though they may together constitute a class, implies an intention to benefit the individuals named. In a gift to a class you look to the description, and inquire what individuals answer to it; and those who do answer to it are the legatees described. But if the parties to whom the legacy is given be not described as a class, but by their individual names and additions, though together constituting a class, those who may constitute the class at any particular time may not, in any respect, correspond with the description of the individuals named as legatees. If a testator give a legacy to be divided amongst the children of A. at a particular time, those who constitute the class at the time will take; but if the legacy be given to B., C., and D., children of A., as tenants in common, and one die before

the testator, the survivors will not take the share of the deceased child. The question must be, Was the intention to bequeath to those who might, at the time, constitute the class, or to certain individuals who, it was supposed, would constitute it?"

It may be added, in further illustration of the distinction, that if there is a gift to a class of children, one born after the making of the will ought to take a share; but in case of a gift to B., C., and D., children of A., a child of A. born after the making of the will would not take.

It is submitted, therefore, that the legacy in controversy must be held to be to John Yard, Jr., and Charles Yard, as tenants in common, either by force of the converting power of the Act of 1812, or by construction of the codicil, but it not being to them as a class, Charles Yard who survived is not entitled to the $58,150 (being the one-half of the said city loan) now in question.

The destination of the lapsed devise was not decided by the Court in Kennedy's Appeal, nor in Mitchell & Keene's Appeal, 10 P. F. Smith's Rep.

It was formerly held in England that where a devise of land in fee became lapsed by the death of the devisee in the lifetime of the testator, the estate devised would not go to the residuary devisee of the real estate, but would descend to the heir-at-law of testator. So that if a certain messuage was devised to A., and the residue of the estate to B., and A. died in testator's life, B. could not take said messuage; because testator intended to give his whole estate in said messuage to A., and at the time he made his will he had no residue left in that messuage, and the devise to A. being void, said messuage would descend to the heirs of testator. But the effect of a general residuary devise is more extensive now than formerly.

As to personal property. If a tenant in common of residue dies in the lifetime of testator, the lapsed gift goes to the next of kin; Creswell *v.* Cheslyn, 2 Ed. 123, or 3 B. P. C.

(Toml. Ed.), 246; Neff's Appeal, 2 P. F. Smith, 326; Craighead *v.* Given, 10 S. & R. 351. It may be that cases are to be found where a lapsed pecuniary or specific legacy has been adjudged to the next of kin on special grounds. In Hutchinson's Appeal, 34 Com. 300, where a testator bequeathed a certain sum individually to his three daughters, it was held that upon the death of one without issue before the death of testator, the bequest to her lapsed, and became *by the Statute*, intestate estate. But usually it is held that only a lapsed share of *residue* passes to the next of kin, because there can be no residue of a residue. The general rule is that a residuary legatee is entitled not only to what remains after the payment of debts and legacies, but also to whatever may by lapse, invalid disposition, or any casualty, after the making of the will, remain undisposed of. (Cambridge *v.* Rouse, 8 Ves. 25; Leake *v.* Robinson, 2 Mer. 392; Woolmer's Estate, 3 Wh. 480; Nyce's Estate, 5 W. & S. 260; Banks *v.* Phelan, 4 Barb. 90; Firth *v.* Denny, 2 Allen, 471; Helms *v.* Franciscus, 2 Bland Ch. 560; Bernhard *v.* Minshull, 1 Johns. 276; King *v.* Woodhull, 3 Edw. Ch. 79; Powell *v.* Slocumb, 2 Taylor, 315; Patterson *v.* Swallow, 8 Wright, 490.)

A lapsed or void bequest goes to the residuary legatee unless very special words are used by the testator to prevent it. (King *v.* Woodhull, 3 Edw. Ch. 79.)

Where a legacy becomes lapsed by the death of the legatee in the lifetime of the testator, and the legacy is not, by the will, disposed of specifically, in such case it passes, by the residuary clause in the will, to the residuary legatees; and not to the next of kin as distributees at law. (Powell *v.* Slocumb, 2 Taylor, 315. See also Taylor *v.* Lucas, 4 Hawks, 215; and Johnson *v.* Johnson, 3 Ired. Ch. 427.)

In Patterson *v.* Swallow, 8 Wright, 490, which was a case of void devise, the Court said that the old distinction between lapsed and void legacies and devises, so far as regards the operation of residuary clauses, has been taken away in Pennsylvania by our Wills Act of 1833, and in other States

and in England, by statutes that have followed ours; and that, since the statutes, the heir never takes either a lapsed or a void legacy or devise if the residuary clause be sufficiently clear and comprehensive to embrace it.

The principle on which these cases proceed is the very just one that every intendment is to be made against holding that man to die intestate who has undertaken to dispose of a residue. (See Stehman *v.* Stehman, 1 W. 475; Bayard *v.* Atkynes, 10 Barr, 18.)

Legatees, tenants in common, take in shares, and, as said in Marsh *v.* Wheeler, 2 Edw. Ch. 156, where a fund is by will directed to be divided among persons specified, in equal shares, without a provision for survivorship, if a legatee dies before the vesting of his share, it will fall into the residue. So in Com. *v.* Nase, 1 Ashmead, 242, it was held that when real and personal property is directed to be equally divided among three individuals, and one of them dies in the lifetime of the testator, the share of such person does not vest in the survivors, but sinks into the residue. So in England now, under the new law, the share of a tenant in common, in case of the failure or revolution of a devise to him, goes to the residuary legatee. (See 1 Jarm. 304–5. See also Dazey *v.* Killam, 1 Duvall (Ky.) R. 403.)

Hence if it should even be assumed (although, as seen below, the assumption is considered unwarrantable) that the latter portion of the Act of 31st March, 1812, comprehends intended testamentary interests of those who die in the lifetime of testator, then, as it directs that the parts of those dying first "shall be considered to every other intent and purpose, in the same manner as if such deceased joint tenants had been tenants in common," it follows from the decisions that said parts must pass to the residuary legatees.

But it is contended on behalf of the legal representatives and next of kin of John Yard, Jr., that by the express terms of said Act, "shall descend or pass by devise and shall be subject to debts, charges, courtesy, or dower, or transmissible to executors or administrators," although no interest vested in

John Yard, Jr., they are entitled to take the legacy which John Yard, Jr. would have received if he had survived the testatrix; that said Act was designed to prevent a lapse into the residue of such intended interests.

Perhaps under such laws as that in Kentucky, on this subject, the children of the deceased legatees, although strangers to the testatrix, would have been entitled. (See Renaker *v.* Lemon, 1 Duvall's R. 213.) But our Act of Assembly does not so provide.

In the Acts passed in favor of the issue of children and other blood relations of the testator to prevent the lapse of legacies and devises, the most definite prohibitory language is employed to effect that object.

In Newbold *v.* Prichett, 2 Wharton, 46, it was held that the Act of 19th of March, 1810 (similar to that of 1833), which declared that no devise or legacy in favor of a child or other lineal descendant of a testator shall be deemed to lapse by reason of the death of such devisee or legatee in the lifetime of the testator, if such devisee or legatee shall leave issue surviving the testator, was intended not to confer any right upon the devisee or legatee to control the devise or legacy, as *e. g.*, by a will of his own, but to give a benefit directly to the issue; it seeming hard, as the Court said, when such devisee or legatee "left issue, and the testator was their lineal ancestor, that the accident of death, perhaps a few days before the testator, should cut them off." But if the construction contended for by the executor and next in kin of John Yard, Jr. be correct, said Act of 1812 was designed not only to abolish survivorship generally, but (*inter alia*) to prevent a lapse, and that, too, not only in favor of the issue or other relations by blood of the testator, but in favor of donees, who are strangers, the next of kin of such strangers, their husbands or wives, their devisees and creditors, and thus indeed, even before a will should take effect, to confer an estate out and out upon a stranger to the blood of the testator, if he happened to be named as a joint tenant, but not otherwise; for it is not disputed

that if the legacy here had been to John Yard, Jr. alone, it would have lapsed by his death into the residue. Now, it may be competent for the Legislature to create and confer estates in this manner, but it has never before been claimed that such was the design of the Act in question; and, considering the unmeaning discrimination in favor of an intended joint tenant as against one who is intended to take in severalty necessarily involved in such design, it would be unreasonable to impute it to the Legislature.

Although the first portion of the Act of 1812 prohibiting survivorship furnishes, according to Kennedy's Appeal, a rule of construction as to interests not vested, manifestly the subsequent provisions, "shall descend or pass by devise, and shall be subject to debts, charges, courtesy, or dower, or transmissible to executors or administrators," which all imply seisin or possession in those dying, were intended not at all to prevent a lapse but to apply only to vested estates and to direct the devolution of the shares in them after the Legislative severance.

This case then, not being within the provisions of the Acts of Assembly passed to prevent a lapse, of course the bequest to John Yard, Jr. lapses, and it is submitted that the one-half of the city loan which he would have received if he had survived the testatrix belongs to the residuary legatees under the will and codicils of Mary P. Loxley.

The one-half of the city loan now in question (except $6550) having been sold, the amount necessary to replace the same is ascertained thus:—

			Present value.
$4,600	six per cent.,	taxable,	$4,784 00
7,000	"	"	7,280 00
7,000	"	"	7,280 00
7,000	"	"	7,280 00
2,500	five per cent.,	"	2,531 25
6,000	"	"	6,075 00
5,300	"	"	5,366 25
9,000	"	"	9,112 50
2,500	"	"	2,531 25
1,900	"	"	1,923 75
6,700	"	"	6,783 75
20,000	six "	not taxable,	21,700 00
2,000	"	"	2,170 00
5,000	"	"	5,425 00
900	"	"	976 50
2,100	"	"	2,278 50
4,000	"	"	4,340 00
1,000	"	"	1,085 00
3,200	"	"	3,472 00
6,500	"	"	7,052 50
2,500	"	"	2,712 50
1,000	"	"	1,085 00
300	"	"	325 50
7,300	"	"	7,920 50
1,000	"	"	1,085 00
2)116,300			2)122,575 75
$58,150			$61,287 87½
Interest to January 1, 1876, inclusive, say,			20,956 44
			$82,244 31

To cover this amount, in pursuance of the 4th clause of the above recited agreement of parties there is severed from the bulk of the estate, in securities and cash, $84,518 92
From which, deducting expenses of settlement, 787 50

We have, ... $83,731 42

This consists of the following described securities, viz:

Bond and mortgage of Charles T. Bonsall to Charles Yard, dated October 23d, 1871, and recorded in J. A. H. 175, p. 4, for . .	$10,000 00
Bond and mortgage of Charles T. Bonsall to Charles Yard, dated May 10th, 1873, and recorded in F. T. W. 45, p. 439, for . .	6,000 00
Interest on the first to April 23d, 1876, . .	2,700 00
" " second to May 10th, 1876, .	1,080 00
Bond and mortgage of Conrad Scheuing to Charles Yard, Ex'r, dated May 15th, 1872, and recorded in J. A. H. 232, p. 544, for .	20,000 00
Bond and mortgage of Conrad Scheuing to Charles Yard, Ex'r, dated May 15th, 1872, and recorded in J. A. H. 250, p. 9, for .	10,000 00
Interest to May 15th, 1876, on both, . .	6,900 00
Certificate No. 901 of the 6 per cent. loan of the city of Philadelphia, free of taxes (Girard Avenue Bridge loan, 51), in name of Charles Yard, Ex'r, dated May 30th, 1873, for $50 certificate, No. 30,039 of the city of Philadelphia 6 per cent. loan, free of taxes (Water loan, No. 2), in name of Mary P. Loxley, dated January 3d, 1870, for $6500, both valued at	7,106 75
Interest on said city loan from July 1st, 1876,	589 50
Dividend Scrip of Schylkill Navigat'n Co., for	7 50
Certificates No. 154 for 10 shares, and No. 490 for 3 shares of stock of the Chesapeake and Delaware Canal Co., in name of Mary P. Loxley, formerly valued at	520 00
Bond and mortgage of Wm. Mara to E. Bonsall, dated February 24th, 1872, mortgage recorded in J. A. H. 200, p. 456; assignment to Charles Yard, recorded in J. A. H. 253, p. 552, for	2,400 00
Carried forward, ...	$67,303 75

Brought forward, ...	$67,303 75
Bond and mortgage of Wm. Mara to D. C. Richardson, dated February 26th, 1872, mortgage recorded in J. A. H. 193, p. 514, assignment to Charles Yard, recorded in J. A. H. No. 253, p. 556, for	500 00
Interest due thereon, from August 24th, 1874, on one $216, and from August 26th, 1874, on the other $45, ...	261 00
Bond and mortgage of J. W. Lauderbach to Charles Yard, Ex'r, dated June 1st, 1874, and mortgage recorded in F. T. W. 161, p. 151, for	7,733 34
Bond and mortgage of James P. Fennel to Charles Yard, Ex'r, dated June 3d, 1874, and mortgage recorded in F. T. W. 163, p. 172, for	4,933 33
Bond and mortgage of Michael Bash to Charles Yard, Ex'r, dated June 30th, 1874, mortgage recorded in F. T. W. 158, p. 290, for .	3,000 00
	$83,731 42

These securities are set aside and awarded into the hands of Messrs. Longstreth, Townsend, Mitcheson, Smith, and Massey, in accordance with the terms of the 4th clause of the said agreement of parties.

If the views above submitted with regard to the destination of the fund to be sustained, the whole fund will go to the residuary legatees; but if it shall be decided that the legal representatives and next of kin of John Yard, Jr., are entitled to said $58,150, of Philadelphia city loan, then the excess of the fund now set aside over and above what shall be necessary to purchase said loan must be paid and transferred to the said residuary legatees.

The executor having paid the succession taxes due to the United States upon the six parcels of real estate specifically devised in the will and second codicil, the question

arose whether or not the said taxes were chargeable to the specific devisees or to the residue?

The amounts paid are as follows, viz:—

On premises devised to	M. Bransby,	. .	$199 50
" "	L. R. Massey,	. .	209 00
" "	Alexander Massey,	.	190 00
" "	E. Childs,	. . .	128 25
" "	C. Yard,	. . .	199 50
" "	M. Jackson,	. . .	144 40

The 11th item of the will is as follows, viz:—

"It is my will, and I direct that all the above devises and bequests shall be free and clear of all collateral *or* inheritance tax."

In the 2d codicil the devise to Margaret Bransby is directed to be "free and clear of all collateral inheritance tax;" and that to Eunice Childs "clear of collateral inheritance tax."

In the 1st codicil testatrix revokes a devise, but in all other respects ratifies and confirms her will. In the 2d codicil she confirms and ratifies her will, excepting the devise revoked by the 1st codicil. In the 3d codicil she ratifies and confirms her will and codicils, excepting any part of the will revoked by codicils.

The Act of Congress imposing the succession tax, had not been passed when the will was written (February 6, 1860), but it had been when the last codicil was written (August 6, 1866). The will being ratified by this last codicil, except so far as altered, speaks from this latter date, and directs all the devises to be "free and clear of all collateral *or* inheritance tax." In England a bequest of a clear yearly sum is a gift free of legacy duty. (Haynes *v.* Haynes, 3 D. M. & G. 590; Pridie *v.* Field, 19 B. 497; Re Cole's Will, Law R. & Eq. 271.) And when the testatrix in this instance directs the devises to be "clear of all collateral or inheritance tax," she evidently means every tax of that nature; and this includes the United States succession tax, which is as much a collat-

eral inheritance tax as that imposed by the laws of Pennsylvania. The testatrix exhibiting a clear intention to free her devises and bequests from collateral inheritance taxes, the verbal criticism which would exclude the succession tax from that category would, it is submitted, be unworthy of her, since it would impute to her, while dispensing her large bounty, the design of subjecting her gifts to one collateral tax and free it from another. Said taxes have been properly paid out of the residue.

If exceptions shall be filed to this ruling, then, in order to meet the contingency of said exceptions being sustained, a fund must be set aside to reimburse the residuary legatees the amount of said taxes. To this end $209 must be deducted from the share of L. R. Massey in the Distribution Report filed herewith, and $190 from the share of Alexander Massey; to these must be added $671.65, the sum of the other four taxes, which is to be taken out of the commissions of the executor. If said exceptions should be sustained, the fund so set aside must be divided among the residuary legatees; but if said exceptions be dismissed, said fund must be returned to the several sources whence it was, as above indicated, derived.

All which is respectfully submitted by

JOHN M. COLLINS,

Auditor.

PHILADELPHIA, May 10, 1876.

The auditor having caused the notice hereto annexed marked "X" to be served upon those who appeared, the exceptions hereto subjoined marked "Y" and "Z" were filed with the auditor; but it is submitted that no one of them is well taken.

All which is respectfully submitted.

JOHN M. COLLINS,

Auditor.

PHILADELPHIA, May 20, 1876.

(Y.)

In the matter of the Estate of Mary P. Loxley, deceased.

Sur account of Charles Yard, executor of the last will and testament of said decedent.

And sur reference of said account to John M. Collins, Esq. as auditor.

And now, May 26th, 1876, Robert McCurdy, Hannah Y. McCurdy, and Ann Eliza McCurdy, children and heirs at law of Hannah K. McCurdy, deceased, which said Hannah K. McCurdy was a daughter of John Yard, Jr. deceased, who was a legatee and devisee under the will of Mary P. Loxley, and Ann Eliza Heintzelman, wife of Rush B. Heintzelman, and daughter of the said John Yard, Jr., deceased, file with the said auditor the following exceptions to the report of said auditor, to wit:—

I. The learned auditor erred in reporting that if the legacy to John Yard, Jr. and Charles Yard referred to them as partners, "neither Charles Yard" nor the estate, "John Yard, Jr., would be entitled to anything, and the whole legacy lapsed."

II. The auditor erred in deciding that "the bequest of John Yard, Jr. lapses."

III. The auditor erred in deciding that "the one-half of the city loan, which he (John Yard, Jr.) would have received if he had survived the testatrix, belongs to the residuary legatees under the will and codicils of Mary P. Loxley."

IV. The auditor erred in overruling the claim of these exceptants.

V. The auditor erred in not awarding to these exceptants the sum claimed by them.

F. CARROLL BREWSTER,
Att'y pro Exceptants above named.

(Z.)

Mary P. Loxley's Estate.

Charles Yard excepts to the auditor's report and for cause of exception shows: —

1. That the learned auditor erred in deciding that Charles Yard is not entitled under the will of Mary P. Loxley, deceased, to the whole of the legacy of $116,300 city sixes.

2. In deciding that as respects the one-half thereof the legacy lapsed by reason of the death of John Yard, Jr., before testatrix.

3. In awarding said remaining one-half of said legacy and the securities substituted therefor to the residuary legatees under Mary P. Loxley's will.

4. In not awarding the same to Charles Yard.

J. COOKE LONGSTRETH, with
H. S. HAGERT,
Attorneys for Chas. Yard.

(X.)

In the Orphans' Court for the City and County of Philadelphia.

In the matter of the estate of Mary P. Loxley, deceased.

Philadelphia, May 10th, 1876.

DEAR SIR: —

Please take notice that my reports in the above matter will be filed in the office of the clerk of the said Court on Saturday, May 20th, 1876; access to the reports may be had in the mean time at my office, No. 711 Walnut St., where exceptions, if any, must be filed.

Yours, truly, JOHN M. COLLINS, *Auditor.*

PHILADELPHIA COUNTY, *ss.*

I certify the foregoing to be a true copy of the original report filed in the office of the Clerk of the Orphans' Court on the 20th day of May, A. D. 1876.

Witness my hand, and seal of said Court, this 12th June, 1876.

A. J. FORTIN,
First Assistant Clerk.

Nov. 4, 1876. The Court. We fail to discover any error in the able and exhaustive report of the auditor, and are clearly of the opinion that the legacy to John Yard and Charles Yard was to them individually as tenants in common; and that John Yard, Jr., having predeceased the testatrix, the legacy to him became lapsed, and passed to the residuary legatees. The exceptions are, therefore, dismissed, and the report confirmed.

Opinion by Hanna, J.

In the Orphans' Court of Philadelphia County.

In the Estate of Mary P. Loxley, deceased.

Sur Exceptions to Auditor's Report.

1876, Nov. 4. And now the exceptions to the Report of the Auditor having been argued by counsel, and considered by the Court, it is ordered, adjudged, and decreed that the said exceptions be dismissed, and the Report confirmed.

WM. B. HANNA.

Nov. 22, 1876. Appeal of Charles Yard filed, security ordered in $500, and duly entered.

Appeal of Charles Yard. In Estate of Mary P. Loxley, deceased.	Supreme Court. January T., 1877. No. 76.

Assignment of Errors.

The Court below erred:—

1. In confirming the Auditor's report.

2. In not finding that Charles Yard is entitled under the will of Mary P. Loxley, deceased, to the whole of the legacy of $116,300 City 6s.

3. In finding that as respects the one-half thereof the legacy lapsed by reason of the death of John Yard, Jr., before testatrix.

4. In awarding said remaining one-half of said legacy, and the securities substituted therefor to the residuary legatees under Mary P. Loxley's will.

5. In not awarding the same to Charles Yard.

J. COOKE LONGSTRETH,
with H. S. HAGERT,
Attornies for Appellant.

Argument.

Mary P. Loxley having made separate provisions for John Yard, Jr., and Charles Yard, who, as a firm conducting the real estate and collection business, were her agents, in the third codicil gave to them in solido, without words of distribution or limitation, City 6s amounting to $116,300. Appellant claims that the evident intent of testatrix was to give this portion of her estate away from her residuary legatees to the beneficiaries named as a class or partnership, so that if either of the individual members survived at her death he would take the whole.

When legacies are given to two or more persons in undivided shares, as £100 to H. & B., or to the children of C., or in case of a bequest to two without words of severance, the legacy will survive as a whole to any survivor of the beneficiaries living at testator's death.

Webster *v.* Webster, 2 P. Wms. 347.
Casey *v.* Willis, 2 P. Wms. 529.
Campbell *v.* Campbell, 4 Bro. C. C. 15.
Morley *v.* Bird, 3 Vesey, Sr., 628, 632.
Whitmore *v.* Trelauny, 6 Vesey, Jr., 130.
Monroe *v.* Story, Supreme Court U. S., Jan. 22, 1877.

And the answer of the Auditor to the position that the legacy is substantially to a partnership, and survives to the surviving member, is founded neither on reason nor authority, for, in a partnership, although there is no survivorship as to property in possession, yet at law there is, as to choses in action.

Anderson *v.* Martindale, 1 East, 497.
Viner's Abridgment, Partner, D.

Kennedy's appeal was the case of a devise of land, where the will spoke from its date, and has no necessary bearing upon the question of a bequest of personalty. Under the words of the Act of 1812, if the devise were a joint tenancy severed by the death of one of the tenants, his heirs would

take by descent, just as in our case, unless the individual member of the partnership or class be considered as undetermined until testator's death, John Yard, Jr.'s share was necessarily transmitted to his personal representatives. But it is submitted that the Act itself has *proprio vigore* no effect upon an ambulatory disposition of personalty, and that Kennedy's Appeal neither inherently nor by analogy or implication draws from that Act a new rule for the interpretation of bequests of personalty. And if the intent of testatrix is to be gathered from her words, neither the children of John Yard, Jr., nor her residuary legatees, can take any portion of the City 6s, because a member of the class or firm, whom she contemplated as the objects of her bounty, competent to take her gift of an undivided chattel, survived her.

J. COOKE LONGSTRETH,
Attorney for Appellant.

SUPPLEMENTAL ARGUMENT.

The vice of the auditor's argument consists in applying to a question of testamentary intention a rule applicable only to vested interests in property. The legacy in this case is clearly a specific legacy. It is "of all the city of "Philadelphia loans of every description now standing in "my name, amounting in all to the sum of one hundred "and sixteen thousand three hundred dollars."

It is the same as "stock standing in my name," in Barton *v.* Cook, 5 Vesey, 461: "all my two hundred and fifty "shares of capital stock in the Union Bank of Pennsylva-"nia," in Blackstone *v.* Blackstone, 3 Watts, p. 335; "one "thousand dollars of the United States six per cent. stock "or loan of the year 1812, standing in my name on the books "of the Loan Office, Pennsylvania, as per Certificate No. "269," Ludlam's Estate, 1 Harris, 188; in each of which cases the bequest was held to be specific. And that the incident of ademption was provided against on a contingency that did not happen, the loan remaining the same at the date of testatrix's death as at the date of her bequest, does not make the legacy less specific.

The reason why this legacy should take effect as a gift of the whole thing specifically described and designated does not depend upon the result of a discussion as to whether the persons named as legatees would, in the event of their both having survived her, have taken as tenants in common or as joint tenants.

Annexed to the bequest of the entire chattel are no words of severance or distribution, and there can be no doubt that the testatrix intended that the whole should pass, and that that was the primary intent, without regard to what disposition her beneficiaries might make of it after they got it. That the first step in that disposition would, under the law, have been equal division, had the beneficiaries not agreed otherwise, does not alter the evident intent to dispose of the thing as a specific entirety.

And so the Civil Law, making a distinction between a conjoint legacy and a legacy of separate and distinct shares, provides in terms that a conjoint legacy shall go to the survivors of the class.

The text of the Digest, XVIII., tit. 5, p. LXIII., reads "Heredes sine partibus utrum conjunctim an separatim "scribantur, hoc interest, quod, si quis ex conjunctis deces- "serit, hoc non ad omnes, sed ad reliquos qui conjuncti erant, "pertinet; sin autem ex separatis, ad omnes, qui testamento "eodem scripti sunt heredes, portio ejus pertinet."

The 1044th article of the Code Napoleon, Tripler, Codes Français, p. 149, is as follows: "Il y aura lieu à accroise- "ment au profit des legataires, dans le cas où le legs sera "fait à plusieurs conjointement.

"Le Legs sera reputé fait conjointement, lorsqu'il le sera "par une seule et même disposition, et que le testateur "n'aura pas assigné la part de chacun des colegataires dans "la chose léguée."

And in Mackie *v.* Story, 3 Otto, 589, the Supreme Court of the United States decides that in the case of a conjoint legacy to two, one dying before the testator, the whole goes to the survivor. The latter case goes further, and decides that the superadded words "to be divided equally between them" do not alter the character of the legacy.

These citations are not deemed inappropriate in a case depending for its solution upon the construction of a will, for the rules laid down in these laws have for their end, the same as ours, the getting at the intention of the testator.

The Common Law, too, holds that a conjoint legacy does not become severable by reason of the death of one of the class of legatees during the lifetime of the testator, as is shown by the cases cited, p. 46, and by the auditor at pages 23 and 24. They would evidently have been considered conclusive by him, except for the error in using a form of expression inapplicable to the circumstances of this case. The question is not whether the bequest is to John Yard Jr., and Charles Yard as joint tenants, for they never took,

jointly, but whether the legacy is a conjoint legacy. And I so state the question, notwithstanding the form in which a like question is stated in Morley *v.* Bird, 3 Vesey, 628. That was the case in which "four hundred pounds out of "seven now lying in the 3 per cent. Consolidated" were given to testator's four daughters, three of whom predeceased him, and yet the whole legacy was held to survive to the fourth. The Master of the Rolls says: "The only point is "whether this legacy is to be considered as a joint legacy "given to the four daughters of Collins as joint tenants." The language is sufficiently accurate to define a case where the words "joint legacy" are synonymous with "legacy given to several as joint tenants," but when, as in our case, it is attempted by a play upon words to make "joint tenancy," as used in the old decisions, mean something different from what it meant before the Act of 1812, the distinction is, if not absolutely necessary, at least convenient and substantial.

It cannot be said that there is any such inconvenience in a testator giving an undivided and indivisible chattel, as for instance, a horse to two, three, or four legatees jointly, as there would be in a joint holding with right of survivorship after the legacy had become vested. And the latter is the kind of inconvenience to which C. J. Tilghman alludes in Bambaugh *v.* Bambaugh, 11 S. & R. 192. Nor is the argument helped by citing the words of Judge Yeates in Duncan *v.* Forrer in relation to the Act of 1812 (which had no operation upon that case), that "joint tenancies in all "cases, except trusts, are transmuted into tenancies in com- "mon," however inaccurate such language may seem to one who reads the Act of March 31, 1812, entitled "an Act concerning joint tenancy," 5 Smith's Laws, 395. Nor by the phraseology of Judge Thompson in Seely *v.* Seely, cited by the auditor, page 26, used in the face of the decision in Arnold *v.* Jack, 12 Harris, 57, which clearly shows that the Act of 1812 was only intended to abolish the incident of survivorship, as an incident to a particular kind

of estate, and did not prevent that incident from being made by apt words a principal, and consequently did not abolish all joint-tenancies. As well might I cite the words of C. J. Black in Auman *v.* Auman, 9 Harris, p. 348, "the *jus accres-* "*cendi* not being taken away by the statute, when husband and "wife are *joint-tenants*, it goes to the heirs or assigns of the "survivor," as an argument in favor of the position, that as respects joint tenancies, technically such and vested in possession, the right of survivorship still remains notwithstanding the statute. Of much greater weight, however, is the decision in Frankenfeld *v.* Gruber, 7 Barr, 448, which reads as follows: "On the death of an intestate without issue, the "third section of the Revised Acts of 1833 gives his per- "sonal estate to his father and mother, if living, jointly and "absolutely; and this, like any other joint chose in action "or chattel, survives to the surviving wife. Had the hus- "band received the assets in this instance, he would have "made them his own, and his wife could have claimed them "only as his administratrix; but as he died a few days after "the death of his son, she is entitled in her own right." This clearly and distinctly recognizes the vital distinction insisted upon, between the effect of a joint giving, and a reduction into possession of the thing given.

The auditor draws from the decision in Kennedy's Appeal, 10 P. F. Smith, p. 511, the inference that the bequest in this case must be read as though it contained words of severance. That is, he imports into the specific bequest of a chattel an intention on the part of the testatrix to divide it, without any other warrant than the law as settled in that case in respect to devises of real estate. It is submitted that no such effect can properly be attributed either to the point decided, or to the language of the learned Judge in that case.

1. The very point was, that in a devise of real estate to several, on the death of one before the devisor, the remaining devisees do not take the whole, but only their aliquot parts of the land. And this, as the auditor shows, p. 28, is

sound law by reason of the devise speaking from the date of the will, a position in nowise weakened by his citation from Girard *v.* City. For what pertinency is there in the reference to the disposing power and capacity of the testator at the date of his will, unless there is not only, at that time, something for it to act on, but also somebody to whom that something is to be given? And so in that very case the learned Judge says: "that the act of disposition must be "complete in every respect at the performance of it." See, also, Girard's Heirs *v.* The City, 2 Wallace, Jr., p. 305. It follows, therefore, that to say that a devise of a freehold speaks from the date of the will, and to deny that the devisee's title relates back to that date, is a contradiction in terms. That the thing devised may be parted with, or that the devisee may die before the will takes effect, does not alter the principle, that if neither of these contingencies happen, the will as defining the subject-matter of the devise and the beneficiary or class of beneficiaries speaks from its date.

2. There is nothing in the language of the learned Judge, having in view the case before him, to warrant the conclusion that in case of the conjoint legacy of an undivided chattel, there must be a lapse as to an aliquot part thereof on the death of one of the legatees before the testator. The language is carefully confined to the case of a devise, and the general intention, when one gives lands to several, that they shall hold it as tenants in common, is strongly insisted upon. But what necessary connection has that with such a legacy as this, which does not differ in kind from a bequest of a jewel, a horse, or any other indivisible chattel? To turn a rule of property, peculiar to real estate, into a canon of interpretation, governing bequests of personalty, would be as bad as to admit a joint-tenancy in land, with the *jus accrescendi,* up to the instant of testator's death, although, then, when the will takes effect, the act *eo instanti* cuts off the survivorship, and turns the estate into a tenancy in common.

The case might, perhaps, safely be rested here, but the learned auditor seeming to place great stress upon his con-

clusion that the bequest is not to John Yard, Jr., and Charles Yard, *as a class*, let us examine whether, as that phrase is understood in the law, this bequest is not to them as a class. The decisions as to what words in particular wills may or may not constitute the legatees or devisees a class, are numerous and collected together in the text-books, so that it would scarcely be even an affectation of learning to copy the list. That the naming of the persons is not fatal to the claim that they shall be considered a class is firmly settled.

Jackson *v.* Roberts, 14 Gray, 546.

Metcalf, J. "But as this rule of construction depends on "the intention of the testator, it is clear that his intention "cannot be conclusively inferred from the fact that he men- "tions by name the individuals who compose the class. It "is only a *prima facie* rule." "The construction is to be "given not solely on the bequest, but on the bequest taken "in connection with the context."

To same effect is—

Stedman *v.* Priest, 103 Mass. 296.

Reading the whole will, and noting the dispositions in favor of the two Yards, we find—

First. That she gives and bequeaths to her friend Charles Yard, "as an evidence of my regard to him," a mortgage (p. 5), that she devises to her friend Charles Yard a piece of real estate (p. 6), that she devises to her friend John Yard, Jr., "as an evidence of my regard for him," another piece of real estate (p. 6), and that she follows these dispositions in a separate item, with a declaration that the bequest and devises "shall be received by them in addition to their usual com- "missions as executors for settling my estate." This is in her original will, dated February 6th, 1860. The motive of these gifts is not left in doubt; they were not as a compensation for services past or prospective; they were simply testimonials of regard or friendship.

Second. More than six years after, by her codicil dated August 6, 1866, she says (p. 11):—

"And, whereas, I have given unto my friends, John Yard,

"Jr., and Charles Yard, certain bequests, now in addition to "the same and in consideration of the long and faithful "services by them both as agents and friends, and from the "care and attention bestowed on my estate, increasing the "same, and their attention to my bodily comfort, I desire to "give them a more substantial compensation and evidence "of my regard for them and their services. I do, therefore, "give, devise, and bequeath unto said John Yard, Jr., and "Charles Yard, all the city of Philadelphia loans of every "description now standing in my name, amounting in all to "the sum of one hundred and sixteen thousand three hun-"dred dollars, or the equivalent of the same in money, "should I dispose of the same, or any part thereof, during "my lifetime; this bequest to be free and clear of collateral "inheritance tax, and in addition to what I have in my said "will devised to them, and to be received by them in addi-"tion to their usual compensation or commissions as execu-"tors for settling my estate."

The new considerations herein expressed, are their long and faithful services as agents and the care and attention bestowed on her estate, increasing the same, for the services as friends, and the attention to her bodily comfort, are in the direct line of the motives that prompted the earlier provisions severally made for each of them. In addition to the evidence of regard that these provisions had manifested, she gives prominence to the idea that the former free gifts were to be supplemented by a "substantial compensation." Now the services which she intended to compensate them for had been rendered by them as a *firm* or *class* of collectors and agents. She no doubt intended the gift to take effect at once, for during her life all the interest as collected was handed over to them (p. 19). She may have been advised to put this in the form of a testamentary disposition rather than an immediate transfer of the principal of the fund. But when she handed the semi-annually accruing interest for nearly four years from the date of the codicil to the date of her death to them, she did not hand it half to each, but

the whole to them jointly. Whether, then, we consider the will and codicils alone, or in connection with this disposition of the interest, the intent is manifest to give it to them as a class, and that no such idea, as that in any possible contingency, any part of the city loans would go to the collateral relatives, whom she made her residuary legatees, ever entered her mind. Her trusted agents who had increased her estate, were to be the executors of her will, and the usual compensation they were to receive in that capacity was not to be lessened by reason of this last gift.

The destructive analysis of the auditor, of appellant's claim, can scarcely avail, as against the plain meaning of this bequest as interpreted by its words and the context. The inaptness of his system to determine this question of testamentary intention, is shown in almost the first sentence of his argument (p. 10), where he qualifiedly admits the force of the alternative position that the reference was to the Yards as partners, but endeavors to show that if so the dissolution of the firm would work a destruction of the bequest. Now although it may reasonably be assumed that Mrs. Loxley knew the meaning of the word partners, it is highly improbable that she could have defined the term "class," as used in this discussion. And yet it can hardly admit of a doubt that a bequest to a partnership is a bequest to a class, and that in determining testamentary intention so great prominence would be given to the consideration of the meaning of the testator in the words that he used as descriptive of that class, that the point of the technical dissolution of the firm by the death of one of its members would be entirely overlooked. The *reductio ad absurdum* would be reached, when we came to consider the effect of a voluntary dissolution of a firm to whom a bequest had been made, before the death of the testator.

Sufficient has been said, it is hoped, to show that no rule of universal, or indeed of general application stands in the way of carrying out the evident intent of the testatrix.

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